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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1247.

THE 931 EAST BOULEVARD COMPANY,

Petitioner,

vs.

CITY OF CLEVELAND, WHITE MOTOR CORPORATION, EATON MANUFACTURING COMPANY, PARK DROP FORGE COMPANY and ROCKEFELLER BROTHERS FUND, INC.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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Inasmuch as respondents' arguments on the merits of the questions presented by the petition are refuted by petitioner's statement of reasons for granting the writ, no reply is made to the first item of respondents' brief. Petitioner files this reply brief, therefore, to answer respondents' contention that the judgment of the Court of Appeals rested on an adequate state ground.[1]

Respondents argue that petitioner's right of appeal was lost because petitioner followed the wrong procedure in filing a motion for new trial in the Court of Appeals. The defect in respondents' position lies in the fact that even if the Court of Appeals had denied the motion for new trial upon a determination that such a motion could

[1] Respondents' brief, pp. 8-11.

not be presented to it, an assumption which petitioner denies,[2] petitioner, nonetheless, was entitled to notice of *that* decision in a manner consistent with due process. For if the Court of Appeals overruled the motion on the ground assumed by respondents, petitioner was denied its opportunity to perfect an appeal to obtain review of *that* order, in the same manner as though the ruling had been made on the merits of the motion.

Thus, it is readily apparent that respondents' argument predicated upon the alleged existence of an independent state ground has no merit whatever and serves merely to becloud the important issues presented in the petition.

Moreover, a review of the record and the Ohio procedural statutes reveals that respondents are in error as to their assumption that an adequate state ground was the basis of the ruling on the motion for new trial. The order reads, in full:

> "Application by plaintiff appellant for new trial denied. Exceptions."

No ground for the denial is stated.

Respondents argue, however, that Section 2321.19, Ohio Revised Code,[3] pertaining to the time within which an application for new trial must be filed, relates to proceedings had in a "trial court," rather than an appellate court. They fail to recognize that the proceedings before the Court of Appeals were on law and fact, and the matter was therefore heard *de novo,* the court sitting as a *trial* court. Section 2505.01(C), Ohio Revised Code, defines an "appeal on questions of law and fact" as a "rehearing and retrial of a cause upon the law and the facts and is the

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[2] See argument, *infra,* pp. 2-4.

[3] The text of which is set out in the Petition, Appendix, p. 42.

same as an 'appeal on questions of fact.' " Section 2505.21, Ohio Revised Code, further provides:

> "An appeal taken on questions of law and fact entitles the party to a hearing of the facts de novo * * *."

Indeed, the journal entry of the Court of Appeals recited that the case "came on for hearing upon the plaintiff's second amended petition, and upon the answers thereto * * * and upon the evidence, including the transcript of testimony taken and the exhibits introduced in evidence in the court below * * *."[4] The judgment of the court was not one of affirmance, but rather "that the plaintiff's second amended petition be and is hereby denied."[5]

The Ohio code of civil procedure expressly authorizes the filing of a motion for new trial in the Court of Appeals. Section 2325.01, Ohio Revised Code, entitled, *Grounds for vacating or modifying final order, judgment or decree by court of common pleas or court of appeals,* provides:

> "The court of common pleas or the *court of appeals* may vacate or modify its own final order, judgment or decree after the term at which it was made:
>
> (a) *By granting a new trial* of the cause within the manner provided in sections 2321.19 and 2321.21 * * *."

In addition to the statute, the rules of the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio, make special provision for consideration of motions for new trial.[6]

Moreover, *McKee v. Clark,* 55 Ohio L. Abs. 496, 90 N. E. 2d 584 (App. Franklin, 1949), cited by respondents,

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[4] Petition, Appendix, p. 33.

[5] *Ibid.* at p. 38.

[6] Rule X, Additional and Supplemental Rule in the Eighth Appellate District, 25 Page's Ohio Revised Code, 67 Supplement, p. 51.

involved an appeal on law only. The court in that case relies upon its earlier decision in *Kromer v. Kear*, 55 Ohio L. Abs. 385, 90 N. E. 2d 422 (App. Franklin, 1949), in which it held that a motion for new trial is not provided for under the code "where the appeal is on questions of law *only*."[7] As petitioner has noted above, the appeal in the instant case was on questions of law and fact.[8] See *Ohio Motors, Inc. v. Charlesworth*, 59 Ohio L. Abs. 103, 97 N. E. 2d 686 (App. Cuyahoga, 1950).

Finally, in *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932), and *Edelman v. California*, 344 U. S. 357 (1953), cited by respondents as cases in which adequate state grounds for the decisions were recognized, either there had been a prior judicial determination by the state court that the procedure followed was incorrect, or the record clearly established that the procedure employed was wrong. In *Baldwin*, the Court noted that the Supreme Court of Idaho had expressly stated in its opinion in the case on review that the procedure followed was incorrect. In *Edelman*, the Court concluded that the record in the case clearly established the existence of a state ground. In the case at bar, neither the decision of the Court of Appeals, nor the record, indicates in any manner whatever that the motion for new trial was denied on procedural grounds, rather than on the merits.

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[7] 55 Ohio L. Abs. at 386.

[8] The journal entry of the Court of Appeals recites: "This case, being before this Court on appeal on questions of law and fact * * *." Petition, Appendix, p. 33.

CONCLUSION.

Respondents' assertion that an independent state ground exists to sustain the decision of the court of appeals is a smoke screen designed to becloud the real issues presented in this case.

Whether or not the decision of the Court of Appeals denying the motion for new trial was entered on a procedural ground, or the merits, petitioner had a right to perfect an appeal from the order in either event. Petitioner was entitled to notice of the decision in accordance with due process. In addition to the question relating to the denial of due process resulting from the mistake of counsel, the petition for certiorari properly presents for the consideration of the Court the question as to whether the single publication of the decision failed to accord petitioner due process of law, in that the means employed to give the notice "was not reasonably calculated to reach those who could easily be informed by other means at hand." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 319 (1950).

Furthermore, there is nothing in the record to establish that the Court of Appeals determined that petitioner followed the wrong procedure. To the contrary, the statutes of Ohio expressly authorize the procedure employed by petitioner.

WHEREFORE, petitioner respectfully renews its prayer that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX.

STATUTES.

Ohio Revised Code.

§ 2325.01 Final order, judgment, or decree of court of common pleas or court of appeals may be vacated or modified.

The court of common pleas or the court of appeals may vacate or modify its own final order, judgment, or decree after the term at which it was made:

(A) By granting a new trial of the cause, within the time and in the manner provided in sections 2321.19 and 2325.21 [2321.21] of the Revised Code;

§ 2505.01 Definitions.

As used in the Revised Code:

(A) "Appeal" means all proceedings whereby one court reviews or retries a cause determined by another court, an administrative officer, tribunal, or commission.

(B) "Appeal on questions of law" means a review of a cause upon questions of law including the weight and sufficiency of the evidence.

(C) "Appeal on questions of law and fact" means a rehearing and retrial of a cause upon the law and the facts and is the same as an "appeal on questions of fact."

§ 2505.21 Hearing on appeal.

Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error

within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded.

An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de novo which shall be upon the same or amended pleadings.